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No.

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

**RESPONDENT'S BRIEF IN OPPOSITION TO THE
GRANTING OF WRIT OF CERTIORARI**

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CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment V:

"No person shall be . . . deprived of life, liberty or property without due process of law. . . ."

United States Constitution, Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

Annotated Code of Maryland 1982 Repl. Vol., Article 27:

594B. Arrest by a police officer without warrant:

"(a) A police officer may arrest without a warrant any person who commits, or attempts to commit, any felony or misdemeanor in the presence of, or within the view of, such officer.

(b) A police officer may, when he has probable cause to believe that a felony or misdemeanor is being committed in his presence or within his view, arrest without a warrant any person whom he may reasonably believe to have committed such offense."

417 — Definitions:

As used in this subtitle,

"(1) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(2) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

(3) 'Distribute' means to transfer possession of, whether with or without consideration.

(4) 'Knowingly' means having knowledge of the character and content of the subject matter.

418 — Sending or bringing into State for sale or distribution; publishing, etc., within State:

"Any person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

RULES

Maryland Rules of Criminal Procedure, 4-324 (1984):

(a) A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence.

No.

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**RESPONDENT'S BRIEF IN OPPOSITION TO THE
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STATEMENT OF FACTS

On May 6, 1981, Detectives Ray Evans and Roland B. Sweitzer, assigned to the Vice-Criminal and Narcotics Section of the Prince George's County Police Department, pursuant to an ongoing investigation of adult bookstores in Prince George's County, which resulted in approximately forty arrests and raids based on police officers' determination of obscenity, went to Silver News, an adult bookstore located at 2488 Chillum Road.

Detective Sweitzer instructed Detective Evans to enter the bookstore and look for material which he, Detective Evans, believed was obscene or would be deemed by the Courts to be obscene. Detective Evans in fact entered the bookstore and browsed through the material for approximately twenty minutes and then selected two magazines,

"Limited Edition" film Review No. Ten and "Diamond Collection" Number One. The windows of the store were covered with paper to a point above eye-level for a normal sized person so that most people could not see into the store. There were magazines on display on the walls almost from the ceiling to the floor. On the right side, empty packages of eight millimeter movies were displayed. In the back was a movie room where customers could view for a fee the movies which were offered for sale.

Detective Evans then approached Respondent, acting as the cashier, and presented the selected materials to him, and since he did not have a warrant for their seizure, he handed the cashier a fifty dollar bill so that he could retain possession of the magazines he had selected. He was charged twelve dollars and given change from the fifty dollar bill. Respondent placed the magazines in a brown paper bag, and Detective Evans exited the store for the purpose of having Detective Sweitzer view the magazines and make a determination that they were obscene. At this time, Detective Evans also intended to go back into the store and arrest the Respondent, retrieve the fifty dollar bill, and keep the magazines and the change.

Detective Sweitzer then viewed the magazines, determined that they were obscene, and then instructed Detective Evans to return to the store and arrest Respondent. Respondent was then placed under arrest, without a warrant. The fifty dollar bill used to "purchase" the package was removed from the store and thereafter retained by the officers in addition to the change received. No search warrant had been obtained by the detectives prior to the arrest of Respondent and the seizure of the materials. No judicial officer had viewed the material prior to the arrest and seizure to establish the existence of probable cause to believe that the material was obscene.

Trial was held before a jury on September 16, 1981 and following the testimony, arguments of counsel and instructions to the jury, and the Court, following the denial of Respondent's Motion For Judgment of Acquittal, submitted the case to the jury for their deliberation. The jury subsequently returned a verdict of guilty.

Respondent then filed a timely Motion For New Trial arguing both that there was no evidence of a crime for the prosecution to have begun, and there was no evidence at all of a crime for the case to be submitted to the jury. It was further argued that his conviction was based on a total lack of evidence, insufficient evidence, and errors of law. This Motion was denied. A timely appeal was then filed to the Court of Special Appeals resulting in the reversal of Respondent's conviction and a dismissal of the charging documents. The Petitioner filed a Motion For Reconsideration which was denied, and subsequently a Petition For Writ of Certiorari to the Court of Appeals of Maryland, which was also denied.

QUESTIONS PRESENTED

I. May a police officer make a warrantless arrest for a crime committed in his presence, i.e. sale of obscene material, and close the book store, requiring customers to leave, prior to determination of probable cause of obscenity by a neutral and detached judicial officer, without effecting a prior restraint?

II. Is the proper remedy suppression of evidence, as opposed to dismissal of the charges for lack of criminal jurisdiction, where the Respondent's arrest and prosecution under a statement of charges is solely based upon the purchase of materials that a police officer had concluded were obscene, but in fact, was neither contraband, evidence or an instrumentality of a crime at the time of the illegal purchase by virtue of the lack of prior judicial

determination of obscenity by a neutral and detached judicial officer?

III. Was reversal of the Respondent's conviction and dismissal of the charging document were a proper remedy for the Court of Special Appeals?

ARGUMENT

I.

A POLICE OFFICER MAY NOT MAKE A WARRANTLESS ARREST FOR A CRIME COMMITTED IN HIS PRESENCE, I.E. SALE OF OBSCENE MATTER, AND CLOSE DOWN THE BOOKSTORE REQUIRING CUSTOMERS TO LEAVE, PRIOR TO DETERMINATION OF PROBABLE CAUSE OF OBSCENITY BY A NEUTRAL AND DETACHED JUDICIAL OFFICER, WITHOUT EFFECTING A "PRIOR RESTRAINT ON FIRST AMENDMENT MATERIALS."

The instant Petition should be denied because the opinion of the Maryland Court of Special Appeals is in conformity with and does not conflict with the mandates of this Court in *Heller v. New York*, 413 U.S. 483, (1973); *Roaden v. Kentucky*, 413 U.S. 496, (1973); *A Quantity of Books v. Kansas*, 378 U.S. 205, 212 (1964), *Marcus v. Search Warrant*, 367 U.S. 717, 730, 731 (1961), and *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979).

Petitioner asks this Court to review the decision of the Court of Special Appeals of Maryland suggesting as one of its reasons, that, "the issue of whether or not the purchase of an allegedly obscene magazine by an undercover police officer constitutes probable cause for the officer to arrest the seller for distribution of obscene matter without a warrant," is a question which has not been decided by this Court. (emphasis supplied).

It is respectfully suggested that the "issue" as stated by Petitioner is on its face incorrect, as the purchase of an allegedly obscene magazine could not constitute probable cause, for the purchase in itself would not under the

present state of the law be considered prohibited criminal conduct under any existing obscenity Statute, State or Federal.

The better framing of the issue would be whether the "sale" of a magazine to an undercover police officer, who personally concludes the magazine is obscene, is sufficient probable cause for the police officer to believe a felony or a misdemeanor is being committed in his presence, or that an offense has actually been committed in his presence, in order that he may make an arrest without a warrant. *Roaden, supra*.

Petitioner expresses concern that the Maryland Court of Special Appeals has created, by judicial fiat, an exception to the Criminal Statute, Article 27, Sec. 594 B, of the Annotated Code of Maryland, that "a police officer can never, as a matter of law, have probable cause to arrest a person for distribution of obscene matter." Art. 27, Ann. Code Md., Sec. 594 B (1984). This conception by Petitioner, to say the least, is misplaced and not true. Petitioner further argues that this result of the Court of Special Appeals was based on prior decisions of this Court which held that "a police officer does not possess the requisite knowledge and sensitivity to seize suspected obscene material without a warrant," citing *Roaden, supra*, *Heller, supra*, *Stanford v. Texas*, 379 U.S. 476, 506 (1965), *Zwicker v. Stanford Baily*, 436 U.S. 547, 564-65 (1918).

Petitioner has obviously misread or misunderstood the holdings of this Court in the aforementioned cases, because this Court has never held that a police officer "does not possess the requisite knowledge and sensitivity to seize suspected obscene material without a warrant." To the contrary, this Court has consistently held that a police officer does not have the ability to make the initial probable cause determination of obscenity. *Roaden, supra*.

Petitioner recognizes and accepts the requirement of prior judicial scrutiny prior to seizure of presumptively protected materials to avoid an unconstitutional "prior restraint." Yet, Petitioner argues that there is no reason to extend the requirement of judicial scrutiny prior to seizure of alleged obscene material, to the arrest of persons who distribute the material, *particularly when the mode of distribution is voluntary sale to undercover police officers*, since this does not involve prior restraint, *even in the instant case* when customers have been ushered out of the store, and the only employee is arrested and required to close the store.

However, the Petitioner correctly states that in finding the arrest in the instant case illegal, the Court of Special Appeals has held that a "necessary predicate" to seizure of a person, as well as the obscene matter he distributes, is prior judicial determination that there is probable cause to believe the matter is obscene. The Petitioner suggests that in support of this holding the Court below relied on three cases of dubious value: 1) *Penthouse International Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); 2) *Delta Book Distributors, Inc. v. Cronvich*, 304 F. Supp. 622, 667 (E.D. La. 1969); 3) *Hall v. State*, 229 S.E.2d 12 (Ga. 1976).

Again, Petitioner has misread and misunderstood the holding of the Court of Special Appeals. Much to the contrary, in answer to the question whether a judicial officer must decide that there is probable cause to believe *matter* is obscene before the matter or its *distributor* may be seized, the Court in the very beginning of its opinion under Section (A) relied on *Roth v. United States*, 354 U.S. 476, 485 (1956), *Speiser v. Randall*, 357 U.S. 513, 528 (1958), *Marcus v. Search Warrant*, 367 U.S. 717, 730, 731 (1961), *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 65 (1963), *A Quantity of Books v. Kansas*, 378 U.S. 205, 212 (1964), *Tyrone v. Wilkerson*, 410 F.2d 679, 641 (4th Circuit, 1969), *Europa Books v. Pomerleau*, 41 Md. App.

114, 121 (1979), *Lo-Ji Sales Inc. v. New York*, 442 U.S. 319 (1979), *Lee Art Theatre v. Virginia*, 396 U.S. 636 (1968), *Roaden v. Kentucky*, 413 U.S. 496 (1973), and *Heller, supra*. It is respectfully submitted that the aforementioned cases, which were relied upon by the Court of Special Appeals, are not to say the least, of dubious value. The Court of Special Appeals made clear that its holding was "*limited to First Amendment rights and was not to be construed as a modification of traditional Fourth Amendment rulings.*"

Petitioner cries out that the Court below has, by judicial fiat, created an exception that prohibits a police officer, as a matter of law, from ever having probable cause to arrest a person for distribution of obscene matter. This statement, Respondent respectfully suggests, is too narrowly presented, and it is not the present state of the law, as mandated by this Court or the Court below. What Petitioner refuses to accept is that this Court has recognized that "a State's power to suppress obscenity is limited by the Constitutional protection for free expression." *Marcus*, 367 U.S. at 731.

"The line between speech unconditionally guaranteed and speech which may *legitimately* be regulated, suppressed or punished is finely drawn and the separation of *legitimate* from *illegitimate* speech calls for . . . sensitive tools . . .".

Speiser v. Randall, 357 U.S. at 525.

Petitioner also refuses to accept the fact that this Court has further mandated, under the Fifth and Fourteenth Amendment, that a State is not free to adopt whatever procedures it pleases for dealing with obscenity, and refuses to accept this Court's mandates that the setting of the bookstore and the commercial theatre are presumptively protected under the First Amendment. *Roaden, supra*; *Lo-Ji Sales, supra*.

Since Petitioner begins its Argument I with the statement that the sale of obscene matter is illegal in Maryland, it becomes very apparent why the State fails to understand the rulings of the Court below and the fact that the same are not in conflict with the decisions of this Honorable Court on the issue raised in Petitioner's Argument I. Petitioner has either misunderstood or failed to properly evaluate this Court's rulings on the following issues: (a) whether or not a police officer has the ability to make the initial determination of probable cause as to obscenity, (b) whether or not prior judicial scrutiny by a neutral and detached judicial officer is required before the arrest of one allegedly distributing obscene matter can be made, and (c) whether or not a warrant must be issued before the arrest of one allegedly distributing obscene matter can be made.

A detailed inspection of this Court's most recent obscenity rulings would have revealed to Petitioner the following:

(1) In *Heller, supra*, police officers viewed in part the film called "Blue Movie" in a theatre in the Greenwich Village area of New York City. On the basis of their observation and request, a judge purchased a ticket and viewed the entire film. At the end of the film, the judge signed a search warrant for the seizure of the film and three "John Doe" warrants for the arrest of the theatre manager, the projectionist and the ticket taker because, in his opinion, the film was obscene under the New York Penal Law during the time it was viewed. *Heiler, supra*.

(2) In *Roaden, supra*, a Sheriff, accompanied by the District Prosecutor, purchased tickets to a local drive-in theatre and observed a film in its entirety, before concluding it was *obscene*. The Sheriff then proceeded to the projection room where he arrested the manager of the theatre, and seized one copy of the film. It was *uncontested*

that the Sheriff had no warrant when he made the *arrest*, there had been no prior determination by a judicial officer on the question of obscenity, and the arrest was based solely on the Sheriff's observing the exhibition of the film. However, it was admitted at trial by the Defendant that the film was obscene.

(3) A further evaluation of this Court's rulings reveals that the determination of probable cause as to what is "*contraband*" when the alleged contraband is a book, film or any tangible form of expression, *must* be made by a neutral and detached judicial officer, rather than solely by a police officer, because books, films and forms of expression are presumptively protected under the First Amendment, along with the setting in which distributed or exhibited. It is no answer just to say that obscene books are *contraband*, and that the standards governing arrests, searches and seizures of allegedly obscene books should not differ from those followed with respect to narcotics, gambling paraphernalia and other contraband. This proposition was rejected in *Marcus, supra*. The State, therefore, must follow a procedure that "focuses searchingly on the issue of obscenity" *eroding or lifting* that Constitutional presumption in order to establish probable cause to seize matter, or to arrest (seize) a person for distributing or exhibiting obscene matter. *Marcus, supra*. That procedure requires that the determination of probable cause of obscenity must be made by a neutral and detached judicial officer who can then issue a warrant for arrest and seizure. *Marcus, supra*. Had the Petitioner thoroughly digested this Honorable Court's opinions it would not have overlooked these important facts as revealed in *Heller, supra*, and *Roaden, supra*, bearing on the issue they raise in their *Argument I*, is, that both in *Heller* and *Roaden* there were *arrests* as well as *seizures* of matter alleged to be obscene. The *probable cause* was the same for the *arrests* as well as the *seizures*, the only

difference being that the *probable cause* determination of obscenity in *Heller* was made by a neutral and detached judicial officer who then issued the arrest and search and seizure warrants, as opposed to the probable cause determination in *Roaden, supra*, being made by a police officer who made the arrests and seizures without a warrant. When the State in *Roaden, supra*, argued to this Court that the arrests and seizures were valid because they were incident to a lawful arrest, this Court made it clear that the decision of *Ledesma v. Perez*, 304 F. Supp. 662 (Eastern District La., 1969) had not been followed. In that case, the Court clearly held improper *arrests* and *seizures*, without warrants, because there had been no prior judicial determination of probable cause of obscenity. That Court made clear that the fact that some materials were *purchased* rather than seized, is of no moment in light of the fact that there had been no prior judicial determination of probable cause of obscenity and no warrants had been issued. *Ledesma, supra*.

Petitioner continues to find comfort in its argument that the decisions in *Heller*, *Roaden* and other cases cited *Supra*, rested on a suppression issue, in violation of Fourth Amendment rights, and therefore concludes that this Court did not deal with the issue of whether a police officer can make the initial determination of probable cause of obscenity and arrest a distributor without a warrant for a crime committed in his presence. However, as described above, this Court has ultimately decided this issue in *Heller*, and *Roaden*.

It should seem clear to Petitioner that the uncontested facts in the instant case are similar if not almost identical to those faced by this Court in *Roaden, supra*. It is uncontested in the instant matter that (a) the police officer had no warrant when he made the arrest of the Respondent, (b) there had been no prior determination by a judicial officer on the question of obscenity and, (c) the

arrest was based solely on the police officer's observation and conclusion that the material was obscene. The only fact different in this case than in *Roaden, supra*, is that the Sheriff in *Roaden* purchased a ticket to view the film, and in this case, the police officer paid for the magazines he had selected with a fifty dollar bill which subsequent to the arrest, was seized without return of the change given to him by the Respondent which they still hold to-date and as a result have deprived the Respondent of property without due process of law, in violation of the Fifth and Fourteenth Amendment of the U.S. Constitution. U.S. Const. Amends. V, XIV.

If this Honorable Court concluded that the Sheriff in *Roaden, supra*, could not make the probable cause determination that the film he saw was *contraband*, and seize it without a warrant incident to a lawful arrest, then *a fortiori*, the police officer in the instant case could not make a similar determination that an offense (sale of obscene magazines) had actually been committed in his presence in order to arrest Respondent without a warrant. This is because at the time the alleged sale took place, in order for the officer to have the ability to make a warrantless arrest for an offense committed in his presence, he must have the *ability* to determine whether an offense has actually been committed. *Roaden, supra*. This he cannot do because in order for the officer to determine that the Respondent is selling obscene magazines, he must be able to make the probable cause determination that the magazine is obscene. *Roaden, supra*, and he cannot do this because at the time he selects and/or purchases the same there is a presumption that the setting in which it is sold and the magazine itself are protected under the First Amendment. *Roaden, supra*. And, until that presumption is *eroded* or *lifted* by some prior judicial scrutiny, the Respondent's conduct in selling such material cannot constitutionally be criminal, since no crime has been committed in the officer's presence.

Roaden, supra. Chief Justice Warren made a similar observation in his concurring opinion in *Roth, supra*, when he stated:

"It is not the book that is on trial; it is a person. The conduct of the Defendant is the central issue, not the obscenity of a book or picture. The nature of the material is, of course, relevant as an attribute of the Defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." 354 U.S. at 495.

If, then, the Respondent's conduct is judged upon the legal status of the material he sells at a time prior to the judicial *erosion* of this Constitutional presumption of protected expression, then he therefore cannot logically distribute, nor can the police purchase, *contraband*. *Roaden, supra*. Thus there is no crime committed in the officer's presence for which he can make a warrantless arrest. *Roaden, supra*.

This, then, is the spirit of this Court's conclusions in the cases, *supra*, which are in line with and not in conflict with the decision of the Court of Special Appeals of Maryland.

For these reasons the Petition should be denied.

II.

THE PROPER REMEDY IS DISMISSAL OF THE CHARGES FOR LACK OF CRIMINAL JURISDICTION WHERE THE RESPONDENT'S ARREST AND PROSECUTION UNDER A STATEMENT OF CHARGES IS SOLELY BASED UPON THE PURCHASE OF MATERIALS A POLICE OFFICER CONCLUDED WAS OBSCENE, BUT WHICH WAS NEITHER CONTRABAND, EVIDENCE, OR AN INSTRUMENTALITY OF A CRIME AT THE TIME OF THE ILLEGAL PURCHASE BY VIRTUE OF THE LACK OF PRIOR JUDICIAL DETERMINATION OF OBSCENITY BY A NEUTRAL AND DETACHED JUDICIAL OFFICER.

Petitioner suggests that "even if, assuming *arguendo*, the warrantless arrest of Respondent was illegal in this

instant case, the only remedy which Respondent was entitled to was suppression of any evidence obtained through exploitation of the illegal arrest."

Petitioner also suggests that the only evidence which should or could have been suppressed was the fifty dollar bill, since no other evidence was obtained by police as a fruit of Respondent's arrest.

Further, the Petitioner states that the Court of Special Appeals, in an attempt to punish police misconduct, went backwards in time to the sale of the magazines which occurred before the arrest, and termed it a "constructive seizure" in order to justify suppression of the magazines and provide Respondent with a meaningful remedy. Petitioner then argues that it is unaware of any prior holding of this Court which would support such mental gymnastics which it characterizes as "backward bootstrapping," a claim which is tantamount to the "pot calling the kettle black," as will be demonstrated further in Respondents argument herein.

A dissection of Petitioner's argument step by step is necessary to demonstrate Petitioner's misunderstanding and/or distortion of this Court's opinions to the facts in the instant case.

In *Roaden v. Kentucky, supra*, this Court, in an opinion delivered by Chief Justice Burger said "*The question presented in this case is whether the seizure of allegedly obscene material, contemporaneous with, (emphasis supplied), and as an incident to an arrest (emphasis supplied) for the public exhibition of such material in a commercial theatre, may be accomplished without a warrant.*"

Obviously then, the ability to seize allegedly obscene material without a warrant as an incident to an arrest, *presupposes* the ability to constitutionally make an arrest

for a *crime* committed in the presence of the arresting officer. *Roaden, supra*.

This Court noted in *Roaden*, that the seizure of a film presents a very different situation from that in which *contraband* is changing hands, or where a robbery or assault is being perpetrated. *Roaden, supra*. In the latter settings, the *probable cause for an arrest* might justify the seizure of weapons, or other evidence or instruments of crime, without a warrant. *Roaden, supra*.

This Court has consistently held to the Constitutional proposition that a police officer cannot make a determination of obscenity, for this must be left to a neutral and detached judicial officer as in *Heller v. New York, supra*. Further, the standards governing arrests, searches and seizures for allegedly obscene material *must* differ from those applied with respect to *narcotics, gambling paraphernalia and other contraband*. *Marcus, supra*.

Moreover, this Court has made clear that the setting of the bookstore or the commercial theatre are presumptively under the protection for the First Amendment. *Roaden, supra*. It is for this latter reason that the Sheriff in *Roaden* was unable to seize an allegedly obscene film, incident to an alleged lawful arrest, without a warrant for a crime committed in the officers presence, i.e. — exhibition of an obscene film. *Roaden, supra*. And, it is for this reason that the Petitioner's Argument II must fail in its entirety when analyzed in light of these legal principles under the First, Fourth and Fourteenth Amendments. U.S. Const. Amends. I, IV, V and XIV.

Petitioner argues that no evidence was obtained through *exploitation* of the illegal arrest of the Respondent, other than the fifty dollar bill retrieved by the police from the register after the arrest, and the retention of the

change given by the Respondent. This argument, adjudged in light of the conclusions of this Court in *Roaden*, are frivolous to say the least. *Roaden, supra*.

Petitioner ironically complains that the Court of Special Appeals indulges in "bootstrapping," when in fact the Petitioner is *guilty of the same conduct*. It attempts to obtain magazines and the money initially paid for the alleged purchase along with change received as evidence of criminal conduct on the part of the Respondent to justify its arrest for the sale of allegedly obscene material. This dubious proposition cannot be sustained in light of *Roaden's* presumption of the setting and material being protected under the First Amendment until there is an *erosion* of the presumption by the judicial process of scrutiny by a neutral and detached judicial officer. *Roaden, supra; Heller, supra*. The real question that must be asked and answered in connection with Petitioner's position is: "How can the material allegedly purchased be considered evidence of an instrumentality of a crime at the time of the purchase and/or sale until a judicial officer makes a determination of obscenity, since the officer does not have the ability under the Constitution to make that determination." The answer under *Roaden* and *Heller* is that such materials cannot be considered *evidence or instrumentalities* of a crime at the time of an alleged purchase and/or sale until there has been a prior judicial determination of probable cause. *Roaden, supra; Heller, supra*. That is why the Deputy Sheriff in *Roaden* could not make a warrantless seizure incident to a lawful arrest for a crime committed in his presence, because he did not have the ability to determine that a crime was actually committed in his presence. *Roaden, supra; Heller, supra*. In point of fact there was no crime of obscenity committed in his presence. *Roaden, supra; Heller, supra*. Why was there no crime committed in his presence? The reason

appears in the observation of Chief Justice Warren in his concurring opinion in *Roth*, when he stated:

"There is more to these cases. It is not the book that is on trial; it is the person. The conduct of the Defendant is the central issue, not the obscenity of the book or picture." *Roth*, 354 U.S. at 495.

If we then judge the Respondent's conduct at the time of the alleged purchase in light of the legal status of the material prior to any judicial scrutiny, the presumption of protected expression in a protected setting continues and all that took place was an *orderly and lawful transfer of material* that was in the eyes of the law Constitutionally not either *contraband*, *evidence* or an *instrumentality* of criminal conduct. *Roaden*, *supra*. Yet, the Petitioner desires to "bootstrap" an anticipated subsequent finding of obscenity by a Court or jury to the Respondent's conduct at the time the police officer was attempting to gather evidence under the facade of a purchase. If, under *Roaden*, the magazines obtained by the police were presumptively protected, then the police within the boundaries of due process can not keep them as evidence along with the Respondent's money. *Roaden*, *supra*. They, therefore, cannot be evidence of a crime, because the Constitutional presumption has not been eroded and continues in favor of the Respondent's conduct. *Roaden*, *supra*; *Marcus*, *supra*; *Lo-Ji Sales*, *supra*. Therefore, the obtaining of the magazines under the circumstances, and their retention and use, was evidence obtained through "exploitation" of the illegal arrest of the Respondent without a warrant prior to any judicial determination of obscenity. *Roaden*, *supra*; *He'ier*, *supra*; *Marcus*, *supra*; *Lo-Ji Sales*, *supra*.

Thus, if the evidence obtained is not evidence or an instrumentality of a crime, then it cannot constitute the basis for a charging document or a prosecution under the Due Process Clause and the prosecution fails before it is begun, *Goodman v. State of Maryland*, 173 Md. 1 (1942);

Morgan v. State of Maryland, 293 Md. 480 (1984). The relief from such an abuse of Due Process is dismissal of the "charging documents," as ordered by the Court of Special Appeals, "relief that justice requires under the circumstances." *Burks v. United States*, 437 U.S. 1, (1978). It is not the illegal arrest that bars the prosecution of the Respondent as the Petitioner argues, but the *insufficiency* and lack of *probative evidence* of a crime from the very inception that bars prosecution and deprives the trial court of its jurisdiction. *Burks*, *supra*. The problem with Petitioner's second argument is that it attempts to compare the obtaining of evidence in the instant case to that of an undercover agent purchasing *narcotics*, who usually retrieves money paid as evidence to be used as evidence at trial. *Roaden*, *supra*. Since narcotics are pure contraband, the officer has the ability to determine that a crime has been committed in his presence. *Roaden*, *supra*. He can therefore arrest the Defendant and make a seizure of evidence incidental to a lawful arrest. *Roaden*, *supra*. The evidence also includes the money paid for the narcotics. *Roaden*, *supra*. What Petitioner refuses to recognize is that this Court has consistently ruled that the procedures and standards governing arrests, searches and seizures of *narcotics* must differ from those applied to allegedly obscene materials. *Roaden*, *supra*.

For these reasons the taking of the magazines and the money by the police at a time when, in the eyes of the law, they were presumptively protected under the First Amendment amounted to a taking of property without due process of law (a seizure). *Roaden*, *supra*; *Heller*, *supra*; U.S. Const. Amends. I, IV, V, XIV. This is why the Sheriff in *Roaden* could not take the film, and for that same reason, this is why the Petitioner's Argument II must fail. *Roaden*, *supra*.

The decision of the Court of Special Appeals is not a totally unwarranted extension of the Fourth Amendment

search and seizure law. It is an enforcement of the guarantee that a person will not have his property taken without due process of law, U.S. Const. Amends. IV, V, XIV. Nor will he be prosecuted without due process of law. U.S. Const. Amends. IV, V, XIV. It is a further guarantee that presumptively protected First Amendment material will not be taken out of circulation from the public and "restrained" as a result of a police officer's conclusion that it is obscene prior to a judicial determination of obscenity. *Roaden, supra; Lo-Ji Sales, supra.*

Petitioner also takes issue with the Court of Special Appeals' conclusion that the arrest of Respondent and the closing of the bookstore operated as "prior restraint." It attempts to create the impression that Respondent's arrest and the closing of the store was an isolated event, contrasting the same with *Penthouse International, Ltd. v. McAuliffe, supra*, where Petitioner admits that the arrests forced many book sellers to voluntarily withdraw certain publications from their shelves. *Penthouse, supra*. What Petitioner fails to reveal is that Respondent's warrantless arrest and the taking of presumptively protected material based on a police officer's conclusion of obscenity was part of a totality of forty arrests and raids as part of an overall scheme where each police officer made the determination of obscenity. The arrests of employees therefore, were, as in *Penthouse, supra*, a restraint of both the sale of presumptively protected material, and public access to the same. This resulted in the prior restraint recognized by the Court of Special Appeals, for in these instances as in *McAuliffe, supra*, "it was the police who attempted to be the censors of what could be available to the adult public," *Penthouse, supra*.

III.

REVERSAL OF THE RESPONDENT'S CONVICTION AND DISMISSAL OF THE CHARGING DOCUMENT WAS PROPER TO PROVIDE THAT RELIEF WHICH WOULD BE "JUST UNDER THE CIRCUMSTANCES."

Petitioner complains that the Court below was not content to merely suppress the evidence and reverse Respondent's conviction upon its finding that the magazines should have been excluded from the trial by granting the motion to dismiss, but undertook the additional unjustified step of ordering that the *charging document* be dismissed under this Court's holding in *Burks v. United States*, 437 U.S. 1 (1978).

Petitioner agrees that this Court's holding in *Burks, supra*, precludes a retrial for double jeopardy reasons in the event reversal is based on evidentiary insufficiency. But Petitioner argues that if reversal is in any way based on trial error, retrial should be required, and further, that the Appellate Court should not under *Burks, supra*, have the discretion to order any other relief. Yet, Petitioner acknowledges that retrial in such a case is not mandated by *Burks, supra*. On Page 30 of its Petition, the following phrase appears: "In holding that retrial to correct trial error is not Constitutionally proscribed by the Double Jeopardy Clause." It is apparent from this phrase that although retrial is not proscribed, *it is also not mandated*. This concept is fortified by the statement in *Burks*:

"Moreover, as *Foreman*, 361 U.S. at 425, has indicated, an Appellate Court is authorized by Sec. 2106 to "go beyond the particular relief sought" in order to provide that relief which would be "just under the circumstances."

437 U.S. at 17-18.

Petitioner objects to the additional step taken by the Court of Special Appeals ordering that the charging

document be dismissed under this Court's holding in *Burks, supra*. Petitioner argues that the reversal should have been based on trial error as opposed to insufficient evidence suggesting that, if trial error is the basis of reversal, then under *Burks, supra*, retrial is mandated. A review of the facts in the instant case make it clear that Respondent's position during trial in their Motion To Dismiss, Motion For Judgment of Acquittal, and Motion For New Trial¹, was that there was insufficient evidence of criminal conduct to give the trial court criminal jurisdiction, and insufficient evidence of criminal conduct to allow the case to go to the jury for consideration, justifying a Judgment of Acquittal. Md. R. Crim. Proced. 4-324 (1984). Having found that there was insufficient evidence of probable cause to arrest and prosecute under the charging document under the First, Fifth and Fourteenth Amendments, the Court of Special Appeals, in part, based its reversal on *insufficiency of evidence*. Further, since the Statement of Charges was based on the police officer's determination of obscenity, the prosecution fails before it is begun. See *Goodman v. State, supra*, *Morgan, supra*. Since there was no prior judicial determination of obscenity, then the Respondent's *conduct* was protected under *Roaden, supra*, and there was insufficient evidence to go to the jury. In addition, since the Court of Special Appeals concluded this purchase was a constructive seizure of constitutionally protected material, not of contraband or evidence of a crime, it therefore recognized that it cannot be used as evidence during trial.

Therefore, in light of the Court of Special Appeals concluding (a) that there was insufficient evidence of criminal conduct, and (b) a warrantless constructive seizure occurred of presumptively protected First Amendment material which should have been excluded from the trial in light of the First, Fifth and Fourteenth Amendments, sufficient for a Judgment of Acquittal, the

Appellate Court was authorized under the *Burks, supra*, concept, to "go beyond the particular relief sought" in *Respondent's Appeal*, in order to provide that relief which would be "*just under the circumstances*." Therefore, what is just in the instant case is dismissal of the *charging document*, since it was not based on either probable cause, or evidence of a crime, *Goodman, supra*. Such a prosecution fails before it is begun, since the Respondent, under the theory of *Roaden, supra*, as a matter of law did not engage in criminal conduct. *Goodman, supra*. Thus, the trial court did not have criminal jurisdiction under the Due Process Clause, and as a result of which the prosecution fails before it is begun, thus forming the basis for dismissal of the charging document, in order to provide that relief under *Burks, supra*, which would be "*just under the circumstances*."

Petitioner petitions the Court for the opportunity to attempt to prove the alleged sale of obscene magazines without the use of magazines as evidence, a task it well knows impossible in light of the requirements mandated by this Court in *Miller v. California*, 413 U.S. 15 (1972). Petitioner argues that Appellate Courts should simply not be allowed to decide on the basis of the Appellate record before them, which may not involve all of the evidence that the State has available to it, whether or not a case can proceed on retrial without the admission of illegally obtained evidence. Such an argument flies in the face of reality in light of *Miller, supra*, which requires consideration of the specific material as a whole by the trier of facts. In spite of the fact that retrial is not mandated by *Burks, supra*, and that *Burks* acknowledges that Appellate Courts are authorized to "go beyond the particular relief sought" in order to provide that relief which would be "*just under the circumstances*," Petitioner suggests that this Court overturn its holding in *Burks* and deprive the Court of Special Appeals of its discretionary authority, in order

to avoid the "stigma" of its holding, which is simply limited to First Amendment rights and not a modification of traditional Fourth Amendment rulings.

In addition, Petitioner's argument that a case may proceed to trial on illegally obtained evidence, is without merit as the evidence although illegally obtained, must be evidence of a crime and in the instant case, it is not.

Therefore, for the purposes of argument it makes no difference whether the alleged purchase is viewed as a "constructive seizure," since the material obtained under the theory of *Roaden, supra; Marcus, supra; Heller, supra; Lo-Ji, supra*, was not evidence of a crime at the time of the purchase. As a result such evidence has no probative relevant value and should not have been allowed into evidence, because to do so would result in First, Fourth, Fifth and Fourteenth Amendment violations. U.S. Const. Amends. I, IV, V, XIV.

Thus, the material obtained should have been excluded from evidence by granting the Respondent's pretrial Motion to Dismiss because the trial Court lacked criminal jurisdiction on the basis that there was no evidence of a crime or criminal conduct constitutionally available to allow the trial to proceed under due process. Const. Amends. I, IV, V, XIV.

CONCLUSION

Petitioner expresses grave concern that the Court of Special Appeals holding is contrary to all established American law and that a police officer can never as a matter of law ever have probable cause to arrest a person without a warrant for the distribution of obscene matter. This concern is overstated in light of this Court's long line of obscenity holdings and the opinion of the Court of Special Appeals (which is not in conflict with this Court's decisions on the issues Petitioner is concerned with.)

Petitioner asks this Court to decide issues it has already dealt with in *Heller, supra; Roaden, supra; Marcus, supra*; and *A Quantity of Books v. Kansas, supra*. Petitioner's concerns should be put to rest as this Honorable Court has already decided that: (a) a police officer cannot make an *ad hoc* determination of obscenity; (b) he cannot make an arrest without a warrant for the crime of obscenity committed in his presence; and (c) there must be prior judicial scrutiny by a neutral and detached judicial officer that material is obscene, which gives rise to probable cause for an arrest, and search and seizure warrant to be issued as the vehicle to allow a police officer to make an arrest and seizure in light of the First, Fourth, Fifth and Fourteenth Amendments.

This therefore is the method by which an officer must obtain probable cause in light of the First, Fourth, Fifth and Fourteenth Amendments, and is distinctly different than that involving narcotics, or other types of *contraband*. Since the material in this instant case was never validly obtained, it legally and presumptively does not represent evidence or instrumentalities of a crime which could be used to initiate or start a prosecution against the Respondent in light of First, Fifth and Fourteenth Amendments. Therefore, this is the justification for reversal and dismissal. It is respectfully submitted that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

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